BRIEF IN SUPPORT OF PETITION.

To the Honorable Supreme Court of the United States:

Petitioner respectfully submits to this Honorable Court the following brief in support of his petition for a writ of certiorari.

The Opinion of the Court Below.

It is not yet reported.

Jurisdictional Statement.

The Court of Claims has sustained the defendant's motion to dismiss plaintiff's petition for a monetary judgment, and dismissed it (R. 11); hence there is a final judgment adverse to the petitioner, reviewable by certiorari under Title 28, Section 288 (b) and (c) of the United States Code. This judgment was dated and entered January 5th, 1942 (R. 11).

Statement of Case.

The essence of the allegations of the petition are:

(1) That plaintiff is an honorably discharged Veteran of the United States in World War I; that for about eight years beginning in 1928, he was employed in the United States Prison Service, Department of Justice, having been appointed, after examination, in accordance with Civil Service Regulations. As a classified employee in the civil service he was entitled to protection of Section 652, Title 5, of the United States Code, requiring that removals from the classified service be only for cause; and was also entitled to the protection of the provision in Title 5, Section 648, that in the event of reductions made in the force in any of the executive departments no honorably discharged

soldier whose record is rated good shall be discharged or reduced in rank or salary.

(2) That on September 3, 1935, while serving as guard at the United States penitentiary at Lewisburg, Pa., at a salary of $1,680.00 per annum, the plaintiff received a formal notice of suspension from the warden; upon a charge of "having written letters to officials of the Government, criticising the administration of prison affairs." He promptly filed a sworn reply stating that the letters were written properly and in good faith and not in violation of Rule XII of the Civil Service Commission. The plaintiff was nevertheless suspended, without a hearing, and was never permitted to resume his duties.

(3) That on or about October 4, 1935, plaintiff wrote the Director of the Bureau of Prisons a letter expressing his regret of the mistake he had made in criticising the prison administration; and received in reply a letter, dated October 8, 1935, from the Assistant Director of the Bureau accepting his explanation and offering him a letter of recommendation; and further stating that if he would send his application for leave without pay, the Bureau would arrange to terminate his suspension, with the understanding that while he would be officially a part of the Prison Service, he do not report back for duty at Lewisburg, but retain the status of an employee on leave without pay pending his efforts to secure a transfer to some other branch of the service. This letter of recommendation set out his record of service; and stated that during this period of employment he had rendered faithful, conscientious service; and that reports from his superior officers show him to be a competent employee.

(4) That in accordance with the above the plaintiff applied for leave without pay; and letter from the Assistant Director to the Warden of the Penitentiary at Lewisburg

at that time stated that the Bureau considered the discipline administered Mr. Baskin through the medium of the suspension was sufficient.

(5) That after a fruitless effort to obtain a transfer to some other branch of the service, plaintiff sought reinstatement as a prison guard. Rebuffed, he consulted legal counsel. In response to a request for pertinent information, his counsel was abruptly advised by the Assistant Director, in a letter dated January 15, 1936, that the plaintiff's "time is up now, and his appointment is, therefore, being terminated for the good of the service."

Notwithstanding the statement previously written by the Assistant Director that the discipline of suspension was considered sufficient for the offense of having criticised the administration of prison affairs, the plaintiff was thus dropped from the service without notice of any new charge, except possibly, by implication, the charge of having consulted a lawyer, and without any opportunity whatever to answer in writing or otherwise as required by the statute.

(6) That the plaintiff was thereafter advised that his appropriate course for justice was to the District Court of the United States for the Eastern District of South Carolina. Suit was filed in that Court in September, 1937. The suit was dismissed on April 6, 1940, for lack of jurisdiction, the Court being of the opinion that the plaintiff was an officer of the United States within the meaning of that portion of the Tucker Act in which the District Courts are denied concurrent jurisdiction with the Court of Claims of cases brought to recover salary of officers. Immediately after the dismissal of the said suit the plaintiff sought to obtain counsel for the prosecution of the matter before the Court of Claims. He was unsuccessful until the time of his petition therein.

(7) Alleges in part that the efforts made by plaintiff in good faith to obtain a transfer to another branch of the civil service failed.

The prayer is for judgment for $6,845.00 salary from January 15, 1936, after deducting $2,605.00 earned in private employment.

The Court of Claims has in effect sustained a demurrer to this petition as failing to set forth a cause of action within its jurisdiction. This was on certain basic propositions hereinafter discussed in the order used by the Court. In doing this, however, the Court seems to have overlooked the principle set forth in such cases as *Leimer* v. *State Mutual Life Insurance Co.*, 108 F. (2d) 302, that there is no justification for dismissing a petition for insufficiency except it appears to *a certainty* that the plaintiff would be entitled to no relief under *any state of facts* which could be proved thereunder. We believe that this principle should be constantly kept in mind in the consideration of this matter.

ARGUMENT.

The following is a summary of the points upon which the decision below turned, and which are questioned here, to wit:

(1) That the action of the Government officials was in accordance with the statute (Title 5, Section 652, U. S. Code) and the regulations of the Civil Service Commission, and is not subject to review by the Court of Claims.

(2) That the termination of plaintiff's suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand the position from which he had been removed, or the pay thereof.

(3) That the termination "for the good of the service" of plaintiff's appointment was clearly not illegal.

(4) That at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to any compensation.

(5) That plaintiff was guilty of *laches* after January 15, 1936, in asserting his claim.

(6) The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision.

(1)

The Bureau of Prisons did not act in accordance with statute, but violated it in both the original suspension and the final dismissal. Title 5, Section 652, of the Code provides:

> "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service."

It was defensive matter to be set up in an Answer and proved thereunder that this removal was for such cause as would promote the efficiency of said service. This was matter in justification of the discharge of the employee, hence had to be pleaded in an Answer.

The burden of proving a sufficient cause for the discharge was on the Master.

39 Corpus Juris, page 101, paragraph 120.

It is true, the Assistant Director's arbitrary fiat of January 15, 1936 is quoted from his letter on the face of the petition, wherein he spoke of the appointment being terminated "for the good of the service;" but there is no such statement on the face of the complaint in reference to the original suspension of Baskin; and even as to the final dis-

charge there is a distinction between the phrase, "for the good of the service," and the clause, "*as will promote the efficiency of the said service.*" It may be "for the good of the service" to maintain the immunity of superiors from the criticisms of their subordinates, however just and well founded that criticism may be; but Congress did not lay that down as a ground for dismissal; and there is no law or regulation which inhibits proper criticism. This is in line with the constitutional right of free speech.

Had the letters and alleged criticisms attributed to the plaintiff been, or even alleged to have been, false or defamatory, the dismissal would have been legal, for, as said by the United States Court of Appeals for the District of Columbia, in *Levine* v. *Farley*, 107 F. (2d) 186, 190:

> "Obviously, therefore, if the charges against the postal officials were false, publication in the newspapers for the purpose of intimidation or of bringing pressure to bear on officials whose duty it was to preserve the efficiency of the service, was conduct tending to disrupt the service; and in this view, the only question for decision is whether a Court may go behind the official findings of the postal authorities and try the questions of fact all over again. We think the rule is that this cannot be done."

The Court was quite correct in this; but in the present case there is no hint that anything this plaintiff wrote was in any degree false or defamatory, and the Court is now confronted with the question as to whether they may not go behind the acts of the authorities, where the only showing before the Court is that the alleged offender did nothing beyond what it was his legal and constitutional right to do; and the Director's office, apparently irked by his communications and his later communicating through counsel, seem to have let animus direct their course.

Moreover, we respectfully submit that neither the Warden of the Penitentiary at Lewisburg, Pa., nor the Assistant Director of Prisons, nor even the Director himself, had any legal authority to terminate petitioner's appointment under the Civil Service rules. The Act of May 14, 1930, c. 274, section 1, appearing as section 753, Title 18, of the United States Code, is quoted on pages 12 and 13 of the petition for certiorari, followed on the next page with the Act of March 3, 1891, c. 529, Section 4 (26 Stat. 839). These Acts vest the power of appointing prison officials exclusively in the Attorney General.

Ordinarily none but the President has the power to appoint, except that in Article II, Section 2, Clause 2 of the Constitution it is written: "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or *in the heads of Departments.*" So that the above quoted acts would have been unconstitutional, had they vested the right of appointment in any one else than the Attorney General, or some other "Head of a Department," to wit: a Cabinet officer.

These statutes confer no power of dismissal upon an assistant Director, nor indeed upon the Director himself. It is an old and familiar doctrine that the power of appointment to public office carries with it the power to remove. *Burnap* v. *United States*, 252 U. S. 512, 64 L. Ed. 692, 40 S. Ct. 374; *Levine* v. *Farley*, 107 F. (2d) 186, Certiorari denied 60 S. Ct. 377, 84 L. Ed. 519, 308 U. S. 622. And so, since the power of appointment was by these statutes reposed solely in the Attorney General, he alone could have dismissed the Petitioner, Baskin. It is significant that the latter was appointed by the Attorney General. *Baskins* v. *United States*, 32 Fed. Supp. 518, 520.

Since, for this reason, in addition to those others hereinabove set forth, Baskin was never lawfully removed, it follows that he is entitled to the salary of his office.

United States v. *Wickersham*, 201 U. S. 390, 50 L. Ed. 198, 26 S. Ct. 469; and other authorities cited *post*.

The District Court of the United States for the Eastern District of South Carolina adjudicated in this identical plaintiff's favor that he was an officer of the United States. (*Baskins* v. *United States*, 32 Fed. Supp. 518, D. C. E. D. S. C. 1940.) The Government was a party to that adjudication, and the Court of Claims was bound to have taken judicial notice of it in deciding this case. There was no appeal. Since, as *res adjudicata*, the plaintiff here was an officer, and his removal was unauthorized by law as above shown, the second position of the Court of Claims, that his suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand the position from which he was removed, or the pay thereof, is completely met and answered with the case of *United States* v. *Perkins*, 116 U. S. 483, 29 L. Ed. 700, 6 S. Ct. 449, from which we quote as follows:

> "The object of this suit was to recover $100 as the salary to plaintiff as a cadet engineer of the navy from June 30, 1883, to September 1, 1883, at the rate of $600 per year, as provided by section 1556 Revised Statutes. Judgment rendered in his favor for that amount.
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> "The plaintiff entered the Navy Academy as a cadet engineer in 1877 and graduated therefrom June 10, 1881. On June 26, 1883, he received a letter from the Secretary of the Navy giving him notice that, as he was not required to fill any vacancy in the naval service happening during the preceding year, he was thereby honorably discharged from the 30th of June, 1883, with one year sea pay as prescribed for cadet midshipmen in accordance with the provisions of the act of Congress approved August 5, 1882. He protested against this order as illegal, refused the pay, and regarded himself as continuing in the service, he sued for his pay subsequently accruing. The case differs from that of Redgrave just decided in one particular only; *that the claim is for pay after the al-*

leged discharge. The single question now raised as to that point is that, although the discharge may not be justified by the act of August 5, 1882, the Secretary of the Navy had lawful power to discharge him from the service at will. This authority is claimed on the ground that the plaintiff was not an officer in the navy service within the meaning of section 1229, R. S., which provides that 'no officer in the military or navy service shall in times of peace be dismissed from the service except on and in pursuance of the sentence of a court-martial to that effect, or in a commutation thereof', and that consequently the right to remove and discharge him from the public service is implied in the power of appointment.

"In reply to that position the Court of Claims in its opinion in the case said:

"In this view we cannot concur. That a cadet engineer like the claimant was a graduate and in the naval service we have already decided; that he was an officer is made manifest by the terms of the Constitution which provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law or in the heads of Departments." Congress has by express enactment vested the appointment of cadet engineers in the Secretary of the Navy, and when thus appointed, they be-ame officers and not employees.'

" 'It follows that, as claimant was not found deficient at any examination and was not dismissed for misconduct under the provisions of Revised Statutes, paragraph 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, paragraph 1229, *he is still in office* and is entitled to the pay attached to the same.'

"We adopt these views and affirm the judgment of the Court of Claims."

A *clerk* illegally suspended is entitled to the salary of his office during the period of his suspension.

Lellmann v. *United States,* 37 Ct. Cl. 128.

See also

McLean v. *United States,* 45 Ct. Cl. 95, and
Miller v. *United States,* 45 Ct. Cl. 509.

> "A regular and duly qualified employee in the classified civil service of the United States is entitled to the compensation attached by law to his position during the period of his wrongful suspension by a subordinate officer."
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> *United States* v. *Wickersham,* 201 U. S. 390, 50 L. Ed. 798, 26 S. Ct. 469.

The *Wickersham case* was approved in *People* v. *Stevenson,* 272 Ill. 219, 111 N. E. 597, where a janitor at capitol was held entitled to pay for services from time of illegal dismissal by Secretary of State until legal dismissal by Civil Service Commission. See also *Ransom* v. *City of Boston,* 192 Mass. 307, 7 Ann. Cas. 733, 78 N. E. 485, and *Ransom* v. *City of Boston,* 196 Mass. 252, 253, 81 N. E. 1000, both holding veteran employed by city as laborer, and discharged without hearing as required by law, is entitled to wages; and *Foster* v. *Hindley,* 72 Wash. 660, 131 Pac. 198, holding sanitary inspector wrongfully deprived of his office by Mayor is entitled to salary.

In *Markus* v. *Duluth,* 138 Minn. 228, 164 N. W. 907, a *de jure* officer illegally removed was held entitled to compensation; in *Finneran* v. *Burlington,* 89 Vt. 6, 93 Atl. 256, a police officer illegally removed was held entitled to salary; and in *Tate* v. *Spokane* 150 Wash. 544, 273 Pac. 749, a laid-off civil service employee entitled to reinstatement was allowed a recovery of salary during period of wrongful separation from employment.

(3)

That terminating plaintiff's employment on grounds stated to be "for the good of the service" was illegal has been demonstrated in our discussion of the Court's basic ground No. 1 above, and need not be repeated here.

(4)

The position of the honorable Court of Claims that at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to any compensation is, we respectfully submit, fully answered in our disposition of their position No. 2, *supra.*

(5)

Laches.

Within a reasonable time, plaintiff filed suit in the District Court of the United States for the Eastern District of South Carolina. The Court of Claims does not seem to lay any special stress on the time that elapsed between the date of his discharge and the institution of that suit, but generally charges him with *laches* in asserting his claim after January 15, 1936 (R. 10). His action in the District Court in South Carolina while fruitless in monetary results showed diligence on his part. He was not a lawyer and did not know how to proceed. But the District Court decision at least adjudicated one useful, practical point in his favor, that he was an officer of the United States.

Delay in instituting suit may be excused where the matter in dispute has in the meantime been the subject of litigation. 21 Corpus Juris 242, citing (*inter alia*), *Illinois Grand Trunk R. Co.* v. *Wade,* 140 U. S. 65, 11 S. Ct. 709, 35 L. Ed. 342; *Pacific R. Co.* v. *Missouri Pac. R. Co.,* 111

U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498; and *Burrows* v. *Interborough Metropolitan Co.*, 156 Fed. 389.

> "Delay pending other proceedings has been held excusable, not only where the termination of such proceedings was necessary for the ascertainment of facts or the establishment of rights and liabilities involved in the latter suit, *but also where the former suit had a similar object but proved unavailing.*" (Emphasis added) 21 Corpus Juris 242.
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> "Thus the fact that plaintiff first commenced his suit in a federal court, which was dismissed on appeal for want of jurisdiction, is a circumstance tending to explain delay."
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> *Hart* v. *Hawkins*, 3 Bibb (Ky.) 502, 6 Am. D. 666, cited in note 86 to 21 Corpus Juris, page 242.

The Court of Claims patently erred in applying the doctrine of *laches* at all; because that is strictly an equitable doctrine, whereas this is absolutely an action at law, in which it has no place whatever.

The very authority cited by the Court of Claims—*Arant* v. *Lane*, 249 U. S. 367, 371, 63 L. Ed. 650; 39 S. Ct. 293—shows that the doctrine is purely equitable.

Under these circumstances, the Court of Claims has completely nullified and made ineffective the six-year statute of limitations which Congress had provided for such cases. Title 28, Section 262, of the U. S. Code. What good is that statute, if claims are to be subjected to the equitable doctrine of *laches* and a much less time applied? Has the Court the repealing or veto power?

Title 28, Section 250 (Subdiv. (1) of the U. S. Code recognizes the jurisdiction of the Court of Claims "in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States *in a court of law, equity* or admiralty, if the United States were suable;" thus recognizing the distinction between law and equity and their separate application.

Rule 86 of the Court of Claims shows that it has a "*Law Calendar;* hence observes the distinction between, and the separate application of, law and equity, just as the statute was designed that it would do so.

There are, of course, numerous cases on record where relief against the Government has been denied because of *laches;* but we have found no decision of the United States Supreme Court, nor of the Court of Claims, which holds that *laches* may be applied *in a law case* to defeat the plain terms of the statute of limitations. In none of the cases we have found where the doctrine of *laches* was applied does it appear that the point was made and stressed, as we do here, or passed on, that the case at bar was a law case to be distinguished from one in equity. *Arant* v. *Lane, supra,* cited by the Court, was a proceeding for mandamus, to which equitable principles have always been applied by the courts; but no mandamus is involved here. This is a strict action for a debt—the equivalent of the common law *indebitatus assumpsit.*

The Alleged Issue of Title to Office.

The Court of Claims correctly decided this case as having jurisdiction, passing on the merits of the petition, without regard to any issue of title to office as destructive of its jurisdiction. This, and the further obvious reason that trial of title to office only arises when there are two or more contenders for the office, make it appear to us that citation of authority is unnecessary to show that the Court of Claims has jurisdiction to entertain this claim, which is founded both upon contract and upon laws of Congress.

For the Court of Claims to have placed upon certain of its decisions the interpretation sought by counsel for the Government in this case, that the Court will disown jurisdiction in every case in which the right to recover depends upon the establishment of title to office, would have been to have entirely nullified the effect of such decisions of this

Court as *Humphrey* v. *United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611; *United States* v. *Knox,* 128 U. S. 230, 9 S. Ct. 63, 32 L. Ed. 465; *United States* v. *Perkins,* 116 U. S. 483, 6 S. Ct. 449, 29 L. Ed. 700; and *United States* v. *Wickersham,* 201 U. S. 392, 26 S. Ct. 469, 50 L. Ed. 798.

The Court of Claims correctly did no such thing, but took jurisdiction of and decided this case upon the merits of the facts presented by the petition.

Conclusion.

For the reasons presented, we respectfully submit that the judgment of the Court of Claims should be reviewed by this honorable Court and reversed, to the end that the plaintiff's case may at least be heard upon the facts thereof, and not stand determined on the face of the pleading.

Respectfully submitted,

MARION W. SEABROOK,
Sumter, South Carolina,
Counsel for the Petitioner.